Tapes #22 and 23
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OREGON CRIMINAL LAW REVISION COMMISSION

Subcommittee No. 2

First Meeting, October 25, 1968

Minutes

Members Present: Senator Thomas R. Mahoney, Chairman
Mr. Deane S. Bennett, Assistant Attorney General, representing Attorney General Robert Y. Thornton

Absent: Representative Carrol B. Howe
Representative James A. Redden

Also Present: Miss Jeannie Lavorato, Research Counsel
Mr. Donald L. Paillette, Project Director
Justice Gordon Sloan, Chairman, Bar Committee on Criminal Law and Procedure

The meeting was called to order at 10:15 a.m. by Chairman Thomas R. Mahoney in Room 309 Capitol Building, Salem.

Kidnaping and Related Offenses; Preliminary Draft No. 1 (Article 12)

Mr. Paillette explained that Subcommittee No. 2 had been assigned the Article on Crimes Against Persons and the subject of the draft to be considered at today's meeting, Kidnaping and Related Offenses, had been arbitrarily selected as a starting point for the subcommittee's work. He advised that Professor Platt had expressed an interest in the area of homicide offenses and had therefore been assigned the drafting for that portion of the Article on Crimes Against Persons.

Miss Lavorato read and explained the draft section by section and reviewed the commentary following each section. Following her presentation the Chairman invited discussion concerning the draft. For ease of reference to these minutes, Miss Lavorato's comments have been combined with the subcommittee's subsequent discussion under each section heading.

Section 1. Kidnaping and related offenses; definitions. Following Miss Lavorato's explanation of section 1, Chairman Mahoney referred to subsection (1) and asked how the definition of "restrain" was distinguished from an unlawful arrest. Mr. Paillette replied that the draft was concerned only with criminal provisions and was not designed to affect civil or tort law.

Chairman Mahoney questioned the use of the term "deadly" as used in subsection (2) (b) and was told by Miss Lavorato that "abduct" defined the offense of kidnaping and the type of physical force employed in the offense of kidnaping was intended to refer to the more serious forms of force which could result in death as opposed to a lesser amount of force which might be used to restrain a person. The definition of "abduct," she said, was drafted on the assumption that

"deadly physical force" would later be defined in the general definition section of the revised criminal code substantially as noted on page 2 of the draft. Chairman Mahoney asked if there had been a judicial determination of the term "deadly" and was told by Mr. Paillette that the term did have a basis in case law and was defined in the Model Penal Code as meaning physical force that under the circumstances in which it was used was readily capable of causing death or serious physical injury. "Deadly physical force," he said, would be defined in the preliminary provisions in order to assure its being employed uniformly throughout the code.

Justice Sloan questioned the use of the phrase, "except as the context may require otherwise," and Mr. Paillette explained that this was a standard format used by Legislative Counsel in the introductory paragraph of definition sections and had been used in all of the drafts.

Section 2. Kidnaping in the second degree. Miss Lavorato explained that kidnaping in the second degree outlined the basic offense of kidnaping. Subsection (2) was set out in brackets as an optional provision.

Section 3. Kidnaping in the first degree. Miss Lavorato noted that section 3 set forth aggravated forms of the basic offense of kidnaping. She commented that the main purpose of a kidnaping -- to compel a person to pay a ransom or reward -- was set out in subsection (1) (a) and avoided the use of the term "reward" which had been interpreted in a number of different ways by the courts.

Mr. Paillette pointed out that subsection (1) (b) was designed to cover the hostage situation where the crime had been committed and the actor was trying to escape from the police. Miss Lavorato remarked that the subsection had been included as an optional provision because if the person was being taken as a hostage, the act would come under subsection (1) (a) and the committee might decide subsection (1) (b) was unnecessary.

She called attention to the use of "substantial" in subsection (1) and said the word involved an important policy decision in light of the number of kidnaping-robbery cases and kidnaping-rape cases where the defendant was prosecuted both for the offense of robbery or rape and also for the offense of kidnaping. Subsection (1) was designed to prevent prosecution of a defendant for kidnaping, where he would be subject to life imprisonment or the death penalty, when the crime actually amounted to a rape or robbery. The Model Penal Code had accomplished this objective by employing "substantial" to differentiate between a detention which would be of such duration that it would become a kidnaping as opposed to detention for a shorter period incidental to the commission of another crime. She gave as an example the detention of a bank employe for 20 minutes while the bank

was being robbed and indicated that under the draft section such an act would be robbery and not kidnaping. The New York code, instead of using "substantial," had included an arbitrary time limit of 12 hours but Miss Lavorato said she had rejected this approach to avoid problems which occurred when an arbitrary time limit was employed and had used "substantial" so that it would be a judicial determination whether the person was taken a substantial distance or was held a substantial period of time.

The committee agreed that "substantial period" was preferable to setting an arbitrary time limit. Mr. Paillette commented that the drafters of the Model Penal Code realized that a term could be defined just so far and if the statute was not going to be tied to a definite number of hours, the best course was to leave some discretion to the court to look at the total circumstances of the crime.

Justice Sloan questioned the meaning of the phrase "or a substantial distance from the vicinity where he is found." Miss Lavorato explained that the phrase was intended to differentiate between a situation where a person was removed from the place where he was found by the kidnaper to a place not within the immediate vicinity as opposed to a mere displacement incidental to another offense, such as removing a person to another room. Justice Sloan contended that the distance the person was moved was unimportant. The victim could be concealed in a place only a few feet from where he was found, he said, and it could be difficult or impossible to find him.

Justice Sloan also objected to the language "removes another from his place of residence or business" which imposed an artificial limitation on the application of the proposed statute. Miss Lavorato explained that language was included to retain the basic nature of the offense of kidnaping for ransom by the removal of a child from his home. Justice Sloan said he could not agree that taking a child from his residence or place of business was more serious than abducting him from a school or playground. The substantial interference with his liberty, he said, was more serious than the distance he was taken or the point from which he was taken. Mr. Paillette agreed that the primary concern should be the intent of the defendant when he committed the act. If the intent was to force someone to pay ransom, the fact that he took the child a short distance should be immaterial.

Mr. Paillette remarked that the use of "he" in subsection (1) was ambiguous in that it was difficult to tell whether the pronoun referred to the kidnaper or to the victim. Justice Sloan suggested the draft use the words "victim" and "abductor" to clarify the meaning and the committee agreed that the entire section should be reworded using "victim" and "abductor" or "actor" throughout. There was a discussion concerning the need to define "victim" and "abductor" and Mr. Paillette commented that it should not be necessary to define "actor" or "victim" since those terms were self-explanatory.

Chairman Mahoney suggested subsection (1) employ "takes" in place of "removes" inasmuch as "take" was well defined in case law. Miss Lavorato replied that "removes" was chosen to incorporate the element of movement. Justice Sloan proposed to use "abducts" in the same way the term was used in section 2. Miss Lavorato commented that if "abducts" were used in that manner, the provision referring to a substantial distance would not be retained. Chairman Mahoney pointed out that a person could be taken to another room in an office building or locked in a bank vault and while the victim would not then be taken a substantial distance, such conduct should be proscribed in the statute.

Miss Lavorato said her concern was that a person should not be charged with kidnaping when the removal was of short duration or when the victim was held in another room for a short period. She noted that the definition of "restrain" did not include the substantial time or substantial distance provisions. Justice Sloan contended that the substantial interference with the victim's liberty was more important than the distance he was moved. He suggested that the section be redrafted to read: "A person commits the crime of kidnaping in the first degree if he abducts another person with one of the purposes listed in the following subsections:".

Miss Lavorato asked if the committee agreed that subsection (b) should be deleted and Justice Sloan replied that the deletion would be satisfactory if it was clearly understood that the hostage situation was covered in subsection (a). Miss Lavorato pointed out that the Model Penal Code actually used the terms "shield or hostage" in the kidnaping section. Justice Sloan recommended inclusion of "shield or hostage" in the Oregon statute because the hostage was not necessarily being compelled to engage in any particular type of conduct and the language in subsection (a) might not apply in every situation. Miss Lavorato asked Justice Sloan if he would then recommend deleting "to engage in other particular conduct, or to refrain from engaging in particular conduct" in subsection (a) and received a negative reply.

Mr. Paillette asked if the Model Penal Code commentary explained the distinction between subsections (a) and (b) of section 212.1 and was told by Miss Lavorato that the comments did not spell out why both subsections were included. She noted that some of the states which had adopted this language deleted "thereafter" in subsection (b).

Chairman Mahoney cited a hypothetical situation where someone was bringing an initiative petition to the Capitol Building to be filed on the day of the filing deadline and he was intentionally detained by a person until the filing time had elapsed. This situation, he said, would come under subsection (d) of MPC section 212.1. He asked Miss Lavorato why she had not included that provision in the draft and was told that she was of the opinion that such an act should not be kidnaping in the first degree. The Model Penal Code provision, she

said, was intended to refer to a situation such as kidnaping the President's daughter to compel the President to do a particular thing.

Mr. Paillette suggested that subsection (a) be amended to read "To compel any person . . ." With the deletion of "third," the subsection would then cover the type of situation referred to by Chairman Mahoney. All members of the committee agreed with this proposal. Miss Lavorato explained that "third person" was used to refer to the person who paid the ransom in the typical kidnaping situation and not to compelling the victim himself to pay ransom. Mr. Paillette replied that a kidnaping was an abduction and with the proposed amendment the draft would say that it was kidnaping in the first degree if any person was abducted with intent to make the victim or anyone else pay ransom. Justice Sloan suggested subsection (a) read "To compel a victim or any other person . . ." and asked if that language would be too restrictive. Miss Lavorato said it would probably be all right in this section and would do away with the necessity of including section 212.1 (d) of the Model Penal Code. Mr. Paillette noted that the section on Theft by Extortion [T.D. #1, Theft Article, section 4] used the term "any person" which was intended to be broad enough to cover the situation of compelling or inducing another person to deliver property.

Mr. Paillette suggested that Miss Lavorato draft two or three alternative versions of section 3 for the committee's further consideration.

Under subsection (2) of section 3 Miss Lavorato explained that if the victim were released alive and without serious bodily injury prior to the trial, the penalty imposed would be less than if the victim were killed. She indicated this was a general mitigation provision that had been adopted by a number of states in recent years. The policy decision behind this provision was that there should be an incentive to the kidnaper to release the victim alive, and the most effective incentive was a substantial reduction in the penalty to be imposed. She noted that the question to be considered was whether to deter kidnaping as a crime by providing for a high penalty in all kidnap offenses or whether it was more important to encourage the kidnaper to release the victim alive by holding out a lesser sentence if he did so.

Section 4. Unlawful imprisonment in the second degree. Miss Lavorato noted that the crime of unlawful imprisonment was new to Oregon law and here the draft used "restrain" as defined in section 1. Subsection (2), an optional section, had been included to assure that parental seizure of a child would not fall under unlawful imprisonment.

Justice Sloan cited a hypothetical situation where a store employe, in conjunction with the shoplifting statute, held someone because he thought that person had shoplifted when in fact he had not.

He asked if section 4 would then make the store employe subject to a charge of unlawful imprisonment in the second degree. Miss Lavorato indicated that it was her intent that section 4 would not touch ORS 164.390 or 164.392 which made "reasonable cause" a defense to an action for false arrest. Mr. Paillette said the committee should consider what kind of a test was to be applied with respect to the knowledge on the part of the store employe. This draft, he said, employed the term "knowledge" whereas the shoplifting statute contemplated an objective test for the employe when it talked about "reasonable cause to believe." From the standpoint of the prosecutor, he said, section 4, by incorporating "restrain" as defin in section 1, would require the state to prove that the defendant knew he was doing something unlawful. Mr. Paillette asked if this then placed too great a burden on the state. One way to reverse this situation, he said, would be to amend section 1 (1) to provide that the section would not apply unless the person knew or had reason to know that the restriction was unlawful.

Justice Sloan commented that part of the problem might be the result of applying the definition of "restrain" to kidnaping situations and attempting to apply the same definition to unlawful imprisonment or custody situations.

Miss Lavorato called attention to page 24 of the draft which set forth the Illinois provision and spelled out in section 10-3 (c) that reasonable detention did not constitute grounds for false arrest. Mr. Paillette indicated this problem had been discussed by Subcommittee No. 1 at the time the theft draft was under consideration and the subcommittee at that time was of the opinion that such a provision might apply to areas of the code other than theft. He suggested it might be better to include in the preliminary provisions of the code a provision exempting certain situations from criminal liability. Justice Sloan was of the opinion that protection against a criminal charge for the store employe or proprietor who detained someone on a shoplifting charge should definitely be included somewhere in the criminal code. Chairman Mahoney indicated he had a strong feeling about allowing too much latitude to store detectives in detaining innocent people and said he would favor either repealing or restricting ORS 164.392.

Justice Sloan asked what particular necessity there was for retaining section 4. Miss Lavorato explained that the purpose of the section was to define an unlawful restraint which would be a less serious offense than a kidnaping. Justice Sloan noted that the threat of civil action was a powerful restraint and perhaps a better restraint than trying to make unlawful imprisonment a crime.

Miss Lavorato pointed out that subsections (a), (b) and (c) in subsection (2) were conjunctive and would only be applicable if all three qualifications were met. She indicated that the committee had

not discussed the matter of using 16 years of age as a cut-off point under subsection (2). Chairman Mahoney noted that a child in a custody case could choose his own guardian at the age of 14, subject to the court's approval. Mr. Bennett commented that a child could n be readily deceived in a custody situation, but in the situation wit which section 4 was concerned, he could be more easily deluded.

Justice Sloan suggested that it would be more specific to say " child who has not reached his sixteenth birthday." Miss Lavorato agreed this was the intent of the draft and observed that whatever age was selected, the chapter should be consistent throughout.

Section 5. Unlawful imprisonment in the first degree. Miss Lavorato explained that unlawful imprisonment in the first degree w the aggravated offense described basically in section 4. Some stat she said, had included this offense under kidnaping but she was of t opinion that involuntary servitude should not carry as severe a penalty as the offense of kidnaping. She pointed out that while section 4 excluded the parent or relative who took a child under 16 years of age and confined him without the use of force, section 5 would subject that parent or relative to the charge of unlawful imprisonment in the first degree if the child was exposed to a risk of serious bodily injury.

Justice Sloan asked if there was a conflict between section 5 and section 7. "Serious bodily injury" as used in section 5, he said, could be the same as endangering his health or safety referred to in section 7. Miss Lavorato stated she envisioned that the risk of serious bodily injury would be a more severe offense than the risk to the victim's safety and section 5 would therefore carry a higher penalty than section 7. She said she had drafted section 5 on the assumption that "serious bodily injury" would be defined in the preliminary provisions. Justice Sloan asked if these two sections might raise a question as to whether the district attorney had unbridled discretion under the language in the statutes in charging the defendant with either a felony or a misdemeanor. Mr. Paillette replied that there had been a number of court decisions subsequent to the Pirkey decision which held that as long as there were reasonable guidelines in the statute, there was no violation of equal protection under the Constitution.

Section 6. Custodial interference in the second degree. Miss Lavorato explained that section 6 would apply not only to a minor child but also to an incompetent or committed person. Mr. Paillette said it was anticipated this offense would be a misdemeanor and could therefore only be enforced within Oregon; no extradition would be available.

Chairman Mahoney asked how section 6 would affect a custody situation where the court had not entered an order or decree. Miss Lavorato explained that the phrase in section 6, "has no legal right

to do so," would be the key language and in the example given by the Chairman both parents would have a legal right to the child. Chairman Mahoney then inquired what the situation would be if the court had entered a decree and one parent could establish that he honestly believed, even though his belief was erroneous, that he had a right to take the child. Mr. Paillette replied that this would be a jury question and his honest belief could be a defense under this section.

Section 7. Custodial interference in the first degree. Miss Lavorato explained that section 7 was the greater offense and was aggravated by a risk to the health and safety of the person taken. Mr. Paillette indicated that section 7 would probably be classified in the felony category.

Chairman Mahoney expressed regret that Representatives Redden and Howe were not present at today's meeting and suggested that they be requested to study the draft and submit their comments.

Mr. Paillette indicated that Miss Lavorato would redraft the material considered at this meeting to reflect the suggestions made by the subcommittee.

The meeting was adjourned at 12:45 p.m.

Respectfully submitted,

Mildred E. Carpenter, Clerk
Criminal Law Revision Commission